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No. 20

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IN THE

Supreme Court of the United States

October Term, 1957

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

MOTION TO ALLOW AND TAX COSTS

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

MOTION TO ALLOW AND TAX COSTS

Appellants respectfully move the Court to allow and tax their entire costs on appeal against appellee railroads,* and allege as follows:

1. On May 28, 1951, appellant Schaffer applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of manufactured and rough granite between various points and places.

2. After oral hearings, in which the appellee railroads and one motor carrier participated in protest, the Commission's Division 5, by report and order dated May 24, 1954, authorized the operations sought to be performed substantially as requested. Only the appellee railroads sought reconsideration by the entire Commission of the action of its Division 5.

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* The appellee railroads, fifty-four in number, are listed at pages 45-46 of the Transcript of Record herein.

3. Pursant to several railroad petitions for reconsideration, Division 5, by order of November 12, 1954, reopened the proceeding for reconsideration on the same record. Thereafter, the entire Commission assumed jurisdiction of the matter.

4. By report and order dated February 7, 1955, the Commission reversed the decision of its Division 5, and denied Schaffer's application.

5. By order of May 16, 1955, the Commission authorized the intervention of appellant, American Trucking Associations, Inc., but denied its, and appellant Schaffer's, petitions for reconsideration.

6. By complaint filed August 8, 1955, in the United States District Court for the District of South Dakota, Northern Division, appellants sought to set aside the order of the Commission denying Schaffer's application. The appellee railroads intervened as defendants.

7. On May 25, 1956, the District Court entered its judgment in favor of defendants, including appellee railroads, and against plaintiffs (appellants).

8. On December 9, 1957, this Court reversed the judgment rendered by the District Court.

9. In reversing the judgment of the District Court, this Court made no order respecting the allowance of costs on appeal to appellants, and there is no provision in this Court's judgment for the allowance of such costs.

10. Rule 57(2) of the rules of this Court provides that in cases of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered.

11. In accordance with Rule 57(2) and long-established practice, appellants, as the prevailing parties, are entitled to recover their entire costs on appeal from appellee rail-

roads, in the absence of any order of this Court to the contrary. Cf. No. 87, *Public Utilities Comm. of California, et al.* v. *United Air Lines, Inc. et al.*, Journal, October Term, 1953, page 153.

12. Appellants do not seek to recover any costs from the United States or any officer or agency thereof and Rule 57(5) of the rules of this Court is inapplicable herein.

13. Appellants' costs on appeal are $1,782.76.

14. Appellee railroads have been primary parties to this proceeding from its inception; in fact, except for their petitions for reconsideration of the report and order of the Commission's Division 5, this matter would undoubtedly have never reached the courts.

15. WHEREFORE, appellants respectfully pray that this Court allow appellants to recover the entire sum of $1,782.76 as and for their costs on appeal of and from appellee railroads.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 29th day of January, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

4. On the National Industrial Traffic League, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Robert N. Burchmore, Esq., 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY